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► To cite this version:

Afroditi Marketou. Constitutional-political change in Greece during the crisis. *Federalismi.it - Rivista di diritto pubblico italiano, comparato, europeo*, 2016, 26. hal-04355716

HAL Id: hal-04355716

<https://hal.science/hal-04355716>

Submitted on 20 Dec 2023

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30 DICEMBRE 2016

Constitutional-political change in Greece
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constitutional deconstruction and the
loss of national sovereignty

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Constitutional-political change in Greece during the crisis. A story on constitutional deconstruction and the loss of national sovereignty^{*}

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1. Introduction

During the last six years Greece has experienced socio-political developments that are unique for a Western state. Five national elections, at least ten governments (some of them not elected), a referendum, unprecedented austerity policies and socio-economic impacts resembling that of a war. These developments, causing a transformation (or even degeneration) of Greek constitutional politics, were not accompanied by formal constitutional change. Of course, the crisis abruptly unveiled the deficiencies of the Greek polity. Thus propositions for constitutional amendments were included in the political programmes of all important parties in the 2012 elections. However this constitutional “moment” simply did not take place; no consensus could be found in society in order to realize it.

The purpose of this paper is to show how the tempestuous socio-political situation during the crisis has been translated into legal and institutional transformation under the existent Constitution. After a brief reference to the socio-political background of the crisis (1), I will show how the Economic Adjustment Programme instruments acquired a *de facto* validity in the domestic order (2), to the detriment of

^{*} Il presente contributo rappresenta la rielaborazione di un intervento tenuto al convegno di studi dal titolo: “*Crisi economica, istituzioni democratiche e decisioni di bilancio*”, svoltosi a Pisa il 3-4 dicembre 2015. Il convegno ha rappresentato uno dei momenti conclusivi dell’unità locale pisana (coordinata dal Prof. Rolando Tarchi) della ricerca PRIN 2010-2011 “*Istituzioni democratiche e amministrazioni d’Europa: coesione e innovazione al tempo della crisi economica*” (responsabile scientifico la Prof.ssa Alessandra Pioggia – Università di Perugia).

Tale attività è poi proseguita nell’ambito del progetto di ricerca di ateneo (PRA 2016) finanziato dall’Università di Pisa, su “*Stato di crisi, poteri di governo, decisioni di bilancio e tutela dei diritti sociali negli stati UE*”, coordinato dal Prof. Roberto Romboli.

Lo scritto, prima di essere inviato alla Rivista è stato sottoposto a referaggio da parte dei responsabili scientifici nazionale e locale e da revisori esterni selezionati dal responsabile dell’unità.

constitutional forms, parliamentary decision making and national sovereignty (3). In section (4) I will investigate how economic emergency has been permanently prolonged, “normalised” and connected to supranational obligations of the country. This contribution will conclude by arguing that, against a political discourse completely dominated by a certain type of economic technocracy, the judiciary is the last rampart of the Constitution. However, insularity of judges from the economic-political situation might end up endangering their legitimacy.

2. The socio-political background of the crisis¹

Since the end of the colonels’ dictatorship (1967-1974), the Greek political scene had been dominated by two major parties: PASOK (Pan-Hellenic Socialist Movement, Socialist) and ND (New Democracy, Right). The decade preceding the economic crisis, the country went through a period of outstanding economic growth. However, the domestic economy and the State mechanism have always been characterized by important structural deficiencies². After five years of consecutive government by the Right, political and social crisis in Greece was already obvious from the violent riots of December 2008. By the 2009 early elections, economic crisis had made its first appearance as well. While the Right warned that austerity policies were the only way to face the hostile economic conjuncture, Socialists won the elections by promising that such measures would not be necessary. However, almost immediately after their victory, Eurostat revealed the real data on the Greek economy, together with the statistics juggling committed by the ND Government. PASOK claimed to have been taken by surprise and decided to adopt an austerity package in March 2010.

Still, the Socialist reforms were not deemed sufficient and the credit rate of the Greek State was devaluated. In April 2010, the Greek Government officially asked for a joint IMF-EU financial assistance. A loan agreement of 110 bn. was concluded, accompanied by the so-called Memorandum of Understanding (hereinafter MoU). The Economic Adjustment Programme (hereinafter EAP), as this complex body of measures and instruments has been called, stipulated unprecedented austerity policies as a condition for financial assistance to Greece³. According to the loan agreement, disbursement of loan

¹ On this paragraph, see A. MARKETOU - M. DEKASTROS, *Report on Greece in Constitutional Change Through Eurocrisis Law*, 16-1-2014, last update 9-6-2015, para I.1, available at eurocrisislaw.eu.eu/greece/ accessed 6-11-2015.

² See also X. CONTIADES - I. TASSOPOULOS, *The Impact of the Financial Crisis on the Greek Constitution*, in X. CONTIADES (ed.), *Constitutions in the Global Financial Crisis*, Surrey, 2013, chapter 7, p. 195.

³ See Greece – Memorandum of Economic and Financial Policies (3-5-2010), in www.imf.org/external/pubs/ft/scr/2010/cr10110.pdf accessed 6-11-2015, p. 47 ff. (The memorandum is hereinafter referred to as the MoU). Actually the MoU was composed by three texts, the Memorandum of Economic and Financial Policies, the Technical Memorandum of Understanding and the Memorandum of Understanding on Specific Economic Policy Conditionality.

instalments would take place through a unanimous Eurogroup decision, following an evaluation of the progress of the reforms by the so-called troika⁴. This tripartite body, composed by a representative of the ECB, the IMF and the European Commission acquired thus extraordinary powers.

The reforms agreed between the Government and the troika proved difficult to implement in practice. The months that followed many general strikes were called, local crises and conflicts between citizens and the police took place, protests became more and more violent and incidents like political suicides repeatedly shocked public opinion. In June 2011, after a vote of confidence in Parliament, the Government succeeded in adopting the Medium Term Budgetary Framework 2012-2015, again containing harsh austerity. However, it had become clear that the first “rescue package” would not be enough. In July the IMF and the EFSF committed the undisbursed amounts of the previous loan (around 40bn.) and an additional 130 bn as financial assistance to Greece in case it was needed. In October 2011, a 50 percent “haircut” of the Greek debt was agreed with the voluntary participation of the private sector (PSI)⁵. Further, new austerity measures were set as a condition for a second loan agreement.

Further austerity was deemed to exceed the mandate of the Socialist Government; thus, the Prime Minister announced a referendum. In public debates, this decision was translated as posing to the Greek people the “Euro or drachma” dilemma. However, under strong pressure by European leaders and a large part of the political world in Greece, Papandreou withdrew the referendum proposal on the 3 November. Some days later, he resigned. On the 11 November a new Government was formed with the support of PASOK, ND, and the far right populist LAOS (Popular Orthodox Rally). Loukas Papademos, a technocrat recognized by the European partners for his service as a Vice-President of the ECB, was appointed Prime Minister. The main task of the new Government was to make sure that Greece would fulfill its obligations vis-à-vis its European partners; then, it would lead the country to elections. In February 2012, and while a violent protest was unfolding outside the Greek Parliament, the second bail-out agreement and the attached MoU conditions were approved by the Greek deputies. Many members of the Government coalition refused to vote the harsh austerity measures involved and were expelled from their respective parliamentary groups, thus significantly weakening the Government majority. The restructuring of the Greek debt was concluded in April 2012 and elections were announced for the 6 May.

⁴ See the Preamble at para 7 and art. 1 of the Loan Facility Agreement available at www.irishstatutebook.ie/eli/2010/act/7/schedule/2/enacted/en/html accessed 6-11-2015 (hereinafter the Loan Facility Agreement is referred to as The Loan Agreement).

⁵ See European Commission, *The Second Economic Adjustment Programme for Greece* (Occasional Paper on the European Economy No 94, March 2012), ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp94_en.pdf accessed 6-11-2015.

The May elections marked a new era in Greek political life. A total of seven parties were elected in Parliament, among which three for the first time (ANEL – Independent Greeks, a right wing patriotic party, DIMAR – Democratic Left, a left wing party formed by deputies who had seceded from SYRIZA and Chrysi Avgi – Golden Dawn, the ultra-nationalist party. The rest of the parties in Parliament were ND, SYRIZA, PASOK, and the Communist Party, KKE). The two traditional main parties, ND and PASOK, obtained a very low percentage (32.03 percent in total combined, instead of 77.39 percent in the elections of 2009), whereas the third party of the Papademos Government coalition, LAOS, did not obtain any seats in Parliament at all. On the other side of the political spectrum, the parties opposed to the Government's austerity policies obtained very high scores. It is remarkable that SYRIZA (Radical Left Coalition), a left wing party composed by components ranged from center left to radical left, quadrupled its 2009 percentage by obtaining 16.78 percent. Chrysi Avgi obtained a little less than 7 percent of the votes, while its percentage in the previous elections had not exceeded 0.25 percent.

The results were interpreted as showing the anger of the Greek people against corruption and the policies of austerity pursued by previous Governments. The social dimension of the crisis was a key factor. Indeed, the political world was literally divided between the Memorandum and the anti-Memorandum forces and so was society⁶. After the shocking results of the May elections, PASOK and ND also integrated in their political programs the renegotiation of the terms of the Memorandum and the adoption of social policy measures.

Yet, the great dispersion of votes made it impossible to form a Government that would enjoy social legitimacy. Besides, the leaders of the two traditional parties had provided letters to the Eurozone partners, expressing their personal commitment to the bailout obligations of the Greek state; and it was precisely these obligations that had been clearly disapproved by the Greek electorate. Therefore, in the lack of agreement between the two first parties, an interim Government under the Prime Minister Panagiotis Pikrammenos, former president of the Council of State, led the country to new elections on the 17 June. During the electoral campaigns, European leaders and the media constantly stressed the danger of a “Grexit”. The June elections showed a stronger polarization of the ND and SYRIZA voters (29,66 percent and 26,89 percent respectively). A coalition Government was formed with the participation of the three pro-European parties (among them the Left DIMAR), under the chief of ND, Antonis Samaras. The mandate of the Greek people was interpreted as imposing the Eurozone membership of the country, with the necessary structural reforms that this choice implied. However, at

⁶ Cf. also X. CONTIADES - I. TASSOPOULOS, *op. cit.*, p. 212. The authors argue that the pro and anti-Memoranda cleavage has substituted the traditional division between Left and Right.

the same time, the Government assumed the task of renegotiation of the harsh austerity conditions set by its European partners.

For almost a year the political situation in Greece seemed relatively appeased. Of course, general strikes, protests, and local conflicts between citizens and the police did not cease to exist. Moreover, racist attacks against immigrants became more and more recurrent. Nevertheless, the Greek people seemed to be used to the functioning of the regime, an opaque complex of meetings between the Government coalition and the troika, resulting to even more opaque messages and decisions. In this context of general degradation of the rule of law, human rights did not remain unaffected. What is more, the excessive use of emergency law-making procedures led to a degeneration of the role of Parliament which was unprecedented in times of democracy. On 12 June 2013, the closure of the public radio and television by the Government authorized by an emergency decree caused the reaction of the press and the political world in Greece and abroad and led to the exit of the Left from the Government coalition.

In 2013 Greece was going through its sixth consecutive year of economic recession. Greek employees had suffered harsh reductions to their income, while unemployment had reached 27.4 percent of the population (8.3 percent in 2007) and 62.5 percent for under 25 years old. According to several NGO statistics, Greece was the country in Europe with the highest increase in suicides.

The socio-economic situation did not change much in the following year, despite the fact that the statistics of the Greek economy slightly ameliorated. In the local, regional and European elections of May 2014 SYRIZA marked an important victory, just like extreme right parties like Chrysi Avgi. This was confirmed in the national elections of January 2015 that were called after a deadlock in the vote for the President of the Republic. SYRIZA collected 36.3 percent of the votes, against 27.8 percent for ND. Chrysi Avgi was the third party, with 6.3 percent of the votes. After its victory, SYRIZA formed a government coalition with the patriot and populist ANEL. The Government perceived its mandate as an obligation to reject the rationale of the EAP while at the same time keeping the country within the Eurozone. Shortly after its nomination, the SYRIZA-ANEL Government announced that it would not apply the EAP agreed by the previous Government and that it did not recognize the troika as an institutional interlocutor⁷.

For six months, harsh negotiations took place between the Government and the country's creditors for a new agreement on the Greek debt. The Government rebuked the technocratic reasoning of the creditors' representatives, stressing that only a political solution was viable. At times, "Grexit" seemed highly possible. The Greek Government often came into direct confrontation with its creditors and

⁷ See *Greece's Varoufakis: "No debt talks with EU-IMF troika"* in BBC 30-1-2015, www.bbc.com/news/world-europe-31055069 accessed 6-11-2015.

accusations of “irresponsibility”, “inexperience”, “lack of realism” or even “terrorism” between the two parties were not a rare phenomenon.

Meanwhile, the Second EAP had been extended by the previous Government. Yet the disbursement of loan tranches had been suspended since autumn 2014, due to the lack of a stable agreement between Greece and its creditors. The liquidity of the country running low, the Government ordered all public sector funds to be transferred into a special Bank of Greece account that would serve the repayment of the country’s debt⁸. Negotiations culminated in June 2015, when Greece was to repay an important sum -which it did not possess- to its institutional creditors (the IMF and the EFSF). Creditors’ proposals were perceived as ultimatums by the Greek Government and it became clear that the accomplishment of its mandate would be impossible. As a last negotiating tool, the Government submitted the creditors’ proposals to the judgement of the Greek people through a referendum, which this time was to actually take place⁹. Prime Minister Alexis Tsipras called the Greek people to vote “no”¹⁰.

Referenda have been very rarely used in Greek politics. The last time that a referendum took place, in 1974, the Greek people had rejected monarchy. The announcement of a referendum on economic policy was thus *per se* a shock for the Greek political world¹¹. Capitals fleeing the country, the ECB decided not to support Greek banks through the ELA. To avoid the collapse of the banking sector, the Government imposed extended bank holidays and capital controls¹². Bank closure shocked the Greek society but at the same time was perceived by many as an instance of the economic war declared by the ECB and the European partners of the country. The results of the referendum were striking. Despite the creditors’ campaign for “yes”, largely supported by the local media and often involving the threat of a “Grexit”, the proposal was rejected by 61.3 percent of the voters¹³.

⁸ N. CHRYSOLORAS - E. CHREPA, *Tsipras to Seize Public-Sector Funds to Keep Greece Afloat* in *Bloomberg*, 20-4-2015, www.bloomberg.com/news/articles/2015-04-20/greece-moves-to-seize-local-government-cash-as-imf-payment-looms accessed 6-11-2015.

⁹ Cf. the proposal submitted to referendum www.ypes.gr/el/Elections/referendum2015/; in English www.referendum2015gov.gr/wp-content/uploads/2015/06/REFORMS-FOR-COMPLETION-OF-CURRENT-PROGRAM-1.pdf and www.referendum2015gov.gr/wp-content/uploads/2015/06/P.S.A.pdf accessed 6-11-2015.

¹⁰ See H. SMITH, *Greek PM Alexis Tsipras calls referendum on bailout terms* in *The Guardian*, 26-6-2015, www.theguardian.com/world/2015/jun/26/greece-calls-referendum-on-bailout-terms-offered-by-creditors accessed 6-11-2015.

¹¹ On the constitutionality of the referendum see A. MARKETOU, *The Greek Referendum: is it Unconstitutional?*, in *Constitutional Change Through Eurocrisis Law*, 3-7-2015, eurocrisislaw.eui.eu/news/the-greek-referendum-is-it-unconstitutional/ accessed 6-11-2015.

¹² *Greek crisis: Banks shut for a week as capital controls imposed - as it happened*, in *The Guardian*, updated 10-7-2015, www.theguardian.com/business/live/2015/jun/28/greek-crisis-ecb-emergency-liquidity-referendum-bailout-live accessed 6-11-2015.

¹³ See *Greek referendum, July 5, 2015*, www.referendum2015gov.gr/en/news/ellinika-telika-apotelesmata-dimosisifismatos-5is-iouliou-2015/ accessed 6-11-2015.

However, surprisingly, it was not the creditors but the Greek Government who changed stance. In the meantime, the extension period of the Second EAP had expired and the Greek Government had sent a request to the ESM for financial support. After what has been described by many witnesses as a very hard meeting, the Euro Summit issued a statement on the matter, on 13 July 2015. Invoking “the need to rebuild trust with Greece”, the country’s European partners forced the Greek Government to request the support of the IMF and to legislate a set of prior actions¹⁴. The implementation of these actions, verified by the European institutions, opened the way for the negotiation of a new program under the ESM framework. The European leaders however had specified that this program would necessarily contain harsh austerity, privatizations and labour market deregulation.

Following its political endorsement by the Eurogroup and its approval by national Parliaments, on 19 August 2015, a detailed MoU was finally signed by the Commission and the Greek authorities¹⁵. The Financial Assistance Facility Agreement between Greece and the ESM was concluded the same day¹⁶. Seeking a fresh democratic legitimation in order to apply the MoU, the Prime Minister called early elections that took place on 21 September 2015. Fear of what was previously perceived as a radical party was now inexistent; SYRIZA thus easily obtained the majority in Parliament¹⁷. It formed again a coalition government with its extreme right partner ANEL.

How have these radical changes in Greek politics been translated into constitutional terms?

3. The de facto validity of the EAP in the domestic sphere¹⁸

The domestic constitutional story of the Eurocrisis starts with statute 3845/2010¹⁹. Under the title “Measures for the implementation of the support mechanism for the Greek economy by the Eurozone MS and the IMF”, the statute included in an annex a draft of the first MoU, as well as relevant Statements by the Euro-area MS’ Heads of State and Government. The policies contained in the First EAP were

¹⁴ See the relevant Euro Summit Statement, 12-7-2015, p. 1, available at www.consilium.europa.eu

¹⁵ See Memorandum of Understanding between the European Commission acting on behalf of the ESM and the Hellenic Republic and the Bank of Greece, ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/01_mou_20150811_en.pdf accessed 6-11-2015.

¹⁶ See Financial Assistance Facility Agreement between the ESM and the Hellenic Republic and the Bank of Greece and the Hellenic Financial Stability Fund, www.esm.europa.eu/pdf/2015-08-19%20GR%20-%20ESM%20-%20FFA%20publication%20version.pdf accessed 6-11-2015.

¹⁷ See *Minister of Home Affairs*, available at www.ekloges.ypes.gr

¹⁸ On this and the following sections, see also A. MARKETOU, *Economic Emergency and the Loss of Faith in the Greek Constitution*, in *CJICL*, forthcoming in 2015, sections 1-3; S. COUTTS - L. DÍEZ SÁNCHEZ - A. MARKETOU - L. PIERDOMINICI, *Legal Manifestations of the Emergency in National Euro Crisis Law* (2015). in *EUI Department of Law Research Paper* No. 2015/14. Available at SSRN: [dx.doi.org/10.2139/ssrn.2610657](https://doi.org/10.2139/ssrn.2610657) accessed 6-11-2015, p. 2 ff.

¹⁹ OJ 65 A’/11-5-2010.

partly implemented in the main part of the law. Art. 3 imposed severe cuts on the revenues of public employees and pensioners. This article also affected employees with a private law contract and declared that it prevailed over any contrary provision, be it part of a collective agreement, arbitral award or individual contract. The rest of the statute's articles imposed tax increases and exceptional levies. Due to these substantive changes in socio-economic policy, the discussion of the statute in Parliament was perceived by all parties as an “historical moment”, which would determine the future of the country²⁰.

It is no exaggeration to say that law 3845/2010 was the legal event that divided the Greek political world and society in pro-memorandum and anti-memorandum forces. Despite its historical importance, emergency left no place for parliamentary discussion on the policies or on the specific measures enacted by the statute. Law 3845 was brought to Parliament under the emergency procedure. The Government stated that its voting was urgent, in order for the relevant loan agreement to be concluded before the 19 May. On this date, a €10bn bond loan matured and, if the country had been unable to repay its creditors, it would have faced bankruptcy and isolation from its Eurozone partners²¹. Deputies had had less than three days to read the statute and its annexes, and only one day to discuss it in Parliament. Even members of the Government later admitted that they had not had the time to read the MoU. The support mechanism and the measures it implied were approved as a whole in one single article, rendering any amendments to specific austerity provisions impossible. Strict party discipline was imposed on the members of the two biggest parties in Parliament. Errors in the Greek translation of the MoU further poisoned the national debate.

However, from a legal scholar's point of view, law 3845/2010 was even more impressive in formal terms, that is, as far as legal norm production is concerned. What was the Parliament actually *doing* when voting on the statute? This matter, concerning the status of international agreements in the domestic sphere, has raised important academic debates in Greece²². Art. 36 regulates the conclusion of international treaties and attributes the relevant constitutional competence to the President of the Republic. Paragraph 2 declares that, conventions on trade, taxation, economic cooperation and participation in international organizations or unions, as well as other conventions containing concessions for which a statute is required or which may burden the Greeks individually, “shall not be operative without ratification by a statute voted by the Parliament”²³.

²⁰ See Minutes of the Greek Parliament, 6-5-2010, p. 6714, www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20100506_1.pdf accessed 6-11-2015.

²¹ See for example Minutes of the Greek Parliament, 6-5-2010, p. 6728.

²² See A. MARKETOU - M. DEKASTROS, *op. cit.*, para X.3.

²³ Source of translation: *Hellenic Parliament*, www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf accessed 6-11-2015.

Once operative, art. 28 defines the status of international law in the domestic legal order. Paragraph 1 states that ratified international conventions “shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law.” Paragraphs 2 and 3 set particular procedural and substantive conditions for the ratification of certain conventions. They declare:

“2. Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement.

3. Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.”

Art. 28 is followed by an interpretative clause stating that it “*constitutes the foundation for the participation of the Country in the European integration process.*”

Was the MoU an international agreement requiring ratification? This was the argument of the Left in Parliament, who raised a procedural objection during the voting of the statute. According to them, the MoU implied the concession of constitutional competences and essential parts of national sovereignty to international organizations. It determined the domestic government and social policy for many years and would constitute a precedent which would apply for decades. Should the MoU then have been voted by a qualified majority as art. 28 of the Constitution imposes? The Socialist Government at the time did not take any position during parliamentary discussions. Parties from the Right, on the other hand, contended that the agreements did not have a legal nature at all. However, in the introductory report to the draft bill it was stated that the annexed MoU was an “integral part of the draft bill”²⁴.

If the MoU had no legal nature, was it then simply the political program of the Government, attached to the statute as part of its explanatory report, or as a solemn publication of its content? This was the line of argument followed by the Council of State in the decision concerning the constitutionality of law 3845/2010. According to the judges, the MoU could not be submitted to judicial scrutiny since it had no direct legal consequences. The constitutionally competent domestic authorities had to enact implementing measures; law 3845/2010 itself was a proof of that²⁵. However, art. 82 of the Constitution attributes the responsibility for defining and directing the general policy of the country to the

²⁴ See the introductory report to the bill, p. 3, www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/AOIKONOMIKVN.pdf accessed 6-11-2015: «*αναπόσπαστο μέρος του σχεδίου νόμου*».

²⁵ See CoS Pl., dec. 668/2012, 20-2-2012, www.dsnet.gr/Epikairothta/Nomologia/668.htm accessed 6-11-2015.

Government. The content of this policy should not then be primarily decided and imposed by supra- or inter- national institutions through informal agreements. Eventually, parliamentary confidence or censure should be declared under a special motion, following art. 84.

According to the majority opinion of the Council of State, legal obligations of the country to implement the economic policy defined in the MoU might result only from the subsequent Loan Agreement²⁶. Until the crisis, however, loan agreements were not deemed to be international conventions creating public law obligations for the State and did not require ratification in order to be operative in the domestic legal sphere. This seemed to be the case for the Greek Loan Facility as well, which was drafted as an economic agreement regulated by English law. Did things change because Greek debt was bought by public organizations, outside the context and rules of the market? The issue has been contested in Greek academic literature. The First Loan Agreement, providing for high interest rates and austerity conditionality, seemed to be a convention that needed ratification according to art. 36, para 2. In this case, a qualified majority according to art. 28 might have been required: imposing the definition of governmental policy, at least partially, by supra- and inter- national organizations, it conceded to them important competences that constitutionally belong to Government.

The procedure followed for its implementation, however, indicates that the Loan Agreement was purported to have only a private economic legal nature. Law 3845 was voted before the signing of the agreement and thus did not ratify it. Nor did a draft ratification bill that was brought to Parliament on the 4 June 2010²⁷. Indeed, this bill was never discussed and voted in the Plenum because the competent Parliamentary Commission considered the ratification of the Loan Agreement not necessary. From the point of view of transparency, moreover, official versions of the Loan Agreement were difficult to find at the time even in English, let alone in Greek.

Nonetheless, statute 3845/2010 contained provisions that conferred to the Agreement a nebulous public law status. Annexed to the statute was the request by the Greek authorities for the activation of the support mechanism and the relevant statements of the Euro-area leaders. Its first article contained a description of the steps taken for the institution and activation of the support mechanism. Even more,

²⁶ *Ibid.*

²⁷ See the draft bill entitled “Ratification of the 8 May 2010 Loan Facility Agreement between the Hellenic Republic as debtor and the MS of the Eurozone and of the KfW as creditors, as well as of the 10 May 2010 IMF Stand-by arrangement. Participation of Greece to the European Support Mechanism” (*«Κόρωση της από 8 Μαΐου 2010 Σύμβασης Δανειακής Διευκόλυνσης μεταξύ αφενός της Ελληνικής Δημοκρατίας ως δανειολήπτη και αφετέρου των κρατών μελών της Ευρωζώνης και του ΚfW ως δανειστών καθώς και του από 10 Μαΐου 2010 διακανονισμού χρηματοδότησης άμεσης ετοιμότητας από το Διεθνές Νομισματικό Ταμείο. Συμμετοχή της Ελλάδας στον Ευρωπαϊκό Μηχανισμό Στήριξης»*), www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/ADANEIO.pdf accessed 6-11-2015. The title and the explanatory report of the draft bill explicitly refer to *ratification* of the Loan Agreement.

in the public discourse of the Government, the fulfillment of the loan agreement conditions was perceived as a binding obligation imposed on the country. In the relevant parliamentary debates the Prime Minister repeatedly stated that the MoU and the statute had not been the Government's political choice but had been imposed by the creditors²⁸.

It might be that the obligatory nature of the EAP resulted from EU and Eurozone membership of the country, which is a choice of Greece as a sovereign State. This hypothesis, expressed by the Council of State majority in the 668/2012 decision, is reinforced by the adoption of the MoU provisions in subsequent Council Decisions. However, it is generally accepted that MS have not conferred to EU institutions the competence to decide in detail broad domains of government policy, such as the ones regulated by the MoU.

Was thus governmental policy in Greece defined according to a non-ratified international agreement? And what did this mean for national sovereignty?

4. Discarding parliamentary decision-making, disregarding national sovereignty

The ambiguity as to the status of the MoU and the Loan Agreement was deliberately preserved in the Second EAP. Drafts of the relevant texts were annexed to statute 4046/2012²⁹, before their signature. With the voting of the statute, the Government was asking for the *approval* of the annexed drafts. They were also asking for the authorisation of the Minister of Finance and the President of the Bank of Greece to represent the country in the negotiations and to sign the agreements, which would be immediately operative³⁰. However, approval is not a procedure instituted by the Greek Constitution, which only provides for *ratification* of international agreements. In the competent Parliamentary Committee the Minister of Finance at the time argued that the MoU were staff level agreements, not needing ratification³¹. Still, art. 1 par. 6 of the statute 4046/2012 declared that certain provisions of the MoU on the Specific Conditions of Economic Policy were “perfect legal rules of direct application” and thus, in a sense, ratified them.

For subsequent versions of the Second EAP documents, the Government chose another road: that of the use, or rather abuse, of emergency constitutional procedures. Indeed, the practice used to circumvent the ratification requirement would confuse even the most cunning constitutional lawyers: the

²⁸ See Minutes of the Greek Parliament, 6-5-2010, p. 6766.

²⁹ OJ 28 A'/14-02-2012.

³⁰ *Ibid*, art. 1 paras 3 and f. The statute in its title itself explicitly stated that what the Government was asking was the *approval* of the annexed texts.

³¹ See the speech by Venizelos, Minister of Finance at the time, in the competent parliamentary committee, 11-2-2012, www.hellenicparliament.gr/Vouli-ton-Ellinon/ToKtiro/Fotografiko-Archeio/#a9f345a6-5cad-40e9-b36a-0a416f376a8c accessed 6-11-2015.

Government issued an emergency decree-law, approving the draft of the relevant loan agreement and authorizing the competent authorities to sign it. Then, when agreements were already valid and operative in the international economic sphere, the relevant decree-laws were introduced into Parliament for ratification, which validated them retroactively in the domestic legal order³².

This is not the only example of Parliament having been called upon to ratify *de facto* established situations. Indeed, during the crisis governments have made increasingly extensive use of the emergency decree-laws, in Greek called “acts of legislative content” (*πράξεις νομοθετικού περιεχομένου*). According to art. 44 par. 1 of the Greek Constitution,

Under extraordinary circumstances of an urgent and unforeseeable need, the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content. Such acts shall be submitted to Parliament for ratification, as specified in the provisions of art. 72 para 1, within forty days of their issuance or within forty days from the convocation of a parliamentary session. Should such acts not be submitted to Parliament within the above time-limits or if they should not be ratified by Parliament within three months of their submission, they will henceforth cease to be in force.

Usually putting forward a formal, self-serving justification³³, crisis governments have used this *sui generis* instrument to implement complex and contentious provisions implementing austerity policies. This practice is even more degrading for the role of Parliament, if one considers that often many such administrative acts have been subsequently ratified *en masse*, annexed to legal statutes which were brought for voting under the emergency procedure³⁴. What is more, the relevant agreements have been voted in one article, thus limiting any possibility of amendment. It is not difficult to see that this practice effectively nullifies parliamentary discussion.

The excessive use of emergency procedures and “acts of legislative content” bears a strong symbolic meaning as well: a similar practice by Ioannis Metaxas in the 1930s completely degraded the role of Parliament and led to the dictatorship of August 1936. Symbolism is important, especially when it concerns what is generally accepted as fundamental in a constitutional democracy. The public television and radio have long functioned as national symbols of speech freedom and have always been attacked by oppressive regimes. The public media were shut down after the issuing of a decree-law that expanded an

³² See A. MARKETOU - M. DEKASTROS, *op. cit.*, p. 94. See for example ΠΝΠ ΟΥ 55 Α'/14-03-2012, art. 1 and 2 and Statute 4060/2012, ΟΥ 65 Α'/22-03-2012, retroactively validating it.

³³ Typically, these acts start with a statement that the Government took into account the “extraordinary circumstances of an urgent and unforeseeable need to ...” take the measures each time contained in the act. See for example, the acts ratified by statute 4111/2013, ΟΥ 98 Α'/25-01-2013.

³⁴ See for example statute 4111/2013. This statute ratified under the emergency procedure six decree-laws containing various complex and totally irrelevant provisions. Among them, there were certain austerity measures, as well as an amendment of the Second Loan Agreement.

already existing legislative delegation to the administration on the matter³⁵. Their closing was presented by the Government as satisfying a requirement set by the troika for reducing the number of public employees, an allegation denied by the creditors. Whatever its source and the reasons for the emergency, the act of legislative content was never ratified by Parliament and therefore ceased to be valid. However, it succeeded in fully producing its *de facto* consequences.

Thus, it seems that under the force of economic adjustment the Greek political regime deviated into a system whereby Parliament is impotent faced with an “executive unbound”³⁶. Yet, Government has not been alone in this reign of the Executive. Policy has in fact been defined in the meetings with the troika. Though the broad powers acquired by the troika in the determination of governmental policy were not mirrored in legislation, they have operated *de facto*. They have been accommodated by the Constitution through their “coating” with a domestic political garb. In other words, whenever the international or constitutional legality of the troika’s requirements was contested, the creditors have claimed that the particular measures adopted were the choice and exclusive competence of the Greek Government³⁷. On the contrary, in public debates recommendations by the troika have been claimed to determine every aspect of government policy. They have been repeatedly invoked by the Government for the justification of the use of emergency procedures and instruments. Giannis Drossos described this as a new way of functioning of the Constitution³⁸.

The loss of national sovereignty and legislative autonomy caused by the troika review missions, combined with the lack of political accountability of the troika members provoked constant contention in public and parliamentary debates. Still, under the second “rescue package”, not only did the troika preserve its broad powers but it also became subtly institutionalized. Indeed, it was mentioned with its name in many official documents of the Second EAP³⁹.

It was only in 2015 that the SYRIZA-ANEL Government officially rejected the *de facto* powers that the tripartite body had acquired to the detriment of constitutional democracy and national sovereignty. This

³⁵ See Act OJ 139 A’/11-6-2013. This act was the legal basis of the Dec. 02/11-6-2013, “Suppression of the public enterprise Greek Radio – Television, A.E. (ERT-A.E.)”, OJ 1414 B’/11-6-2013.

³⁶ L. PAPADOPOULOU, *Can Constitutional Rules, Even If “Golden”, Tame Greek Public Debt?*, in M. ADAMS - F. FABBRINI - P. LAROCHE (eds.), *The constitutionalization of European budgetary constraints*, Oxford, 2014, p. 236.

³⁷ See the Joint Answer given by Mr Rehn on behalf of the Commission to the questions raised in the European Parliament on the closure of ERT [www.europarl.europa.eu/RegData/questions/reponses_qe/2013/006815/P7_RE\(2013\)006815_EN.pdf](http://www.europarl.europa.eu/RegData/questions/reponses_qe/2013/006815/P7_RE(2013)006815_EN.pdf) accessed 6-11-2015.

³⁸ G. DROSOS, *To ‘Μνημόνιο’ ως σημείο στροφής του πολιτεύματος (The ‘Memorandum’ as a turning point of the regime)*, www.constitutionalism.gr, also published in *The Book’s Journal*, 6, April 2011, p. 42.

³⁹ See for example European Commission, *The Second Economic Adjustment Programme for Greece - Second Review* (Occasional Paper on the European Economy No 148, May 2013), ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp148_en.pdf accessed 6-11-2015.

changed the situation for some months. The troika missions to Athens were suspended and the Greek Government, after five years, was able again to implement government policy without consulting the creditors and sometimes even to their explicit disagreement⁴⁰.

However, the situation could not last long. In the end, the Government had to pay a high price for its defiance of the troika's technocratic "advice". In the Euro Summit Statement of 13 July 2015 a set of prior actions was defined to be implemented "without delay", in order for the negotiations with the European partners to restart⁴¹. For some major reforms "without delay" meant in three days' time⁴². Determination of governmental policy went so far as to require changes in the core of the Greek legal system like, most notably, an extensive reform of the Code of Civil Procedure⁴³. What is more, the Greek authorities committed to "withdraw legislations (...) backtracking on previous program commitments or identify clear compensatory equivalents for the vested rights that were subsequently created"⁴⁴. The prior actions required by the creditors were included in an emergency omnibus bill and were voted in one article. To justify the circumvention of constitutional procedures the Government invoked the Euro Summit Statement and the "particularly exceptional circumstances" triggered by it⁴⁵.

Under the subsequent ESM program contempt of the Constitution and national sovereignty persists, with the exception of some purely aesthetic changes. For the application of the EAP, the troika, elegantly renamed "Institutions", will continue its review missions to Athens⁴⁶. The Greek Government has committed "to consult and agree with the Institutions on all draft legislation in relevant areas with adequate time before submitting it for public consultation or to Parliament."⁴⁷

The EAPs have thus operated in the domestic legal order with no respect for constitutional procedures and forms. Incoherent justifications of the measures, opportunistically advanced by Government according to the forum to which they were addressed, excluded every kind of accountability. Legal accountability was excluded since the MoU was argued to be a political program. Still, political accountability was considerably limited as well, since the program was argued to result from binding supra or international obligations and its specific provisions were barely discussed in parliamentary

⁴⁰ See for example law 4320/2015, OJ 29 A'/19-3-2015, Provisions for adopting immediate measures to face the humanitarian crisis, for the organization of Government and of Government organs and other provisions.

⁴¹ See the Euro Summit Statement.

⁴² *Ibid*, p. 1 and ff.

⁴³ *Ibid*, p. 2. Note that the deadline for the implementation of this reform was 11 days.

⁴⁴ *Ibid*, p. 5.

⁴⁵ See statute 4334/2015, OJ 80 A'/16-7-2015 and the relevant explanatory report at www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/e-ems-eis.pdf accessed 6-11-2015.

⁴⁶ See the Euro Summit Statement, p. 5.

⁴⁷ *Ibid*.

debates. Economic emergency left no place for democracy and progressively led to the total loss of national sovereignty. As their lengthy duration indicates, these features have acquired a permanent character and have now become a typical trait of everyday constitutional politics in Greece.

5. Economic “emergency”?

The constant use of abbreviated procedures and the *de facto* operation of the Euro-crisis instruments indicates the existence of an economic emergency. Though art. 48 of the Constitution, which provides for a constitutional state of siege, was never invoked⁴⁸, governments have often used a rhetoric reminiscent of a state of war or exception⁴⁹. In the explanatory report accompanying statute 3845/2010, they argued that the activation of the support mechanism and the onerous measures agreed in the MoU were an “action of responsibility and an historical obligation to face the danger of collapse of the Greek economy.”⁵⁰. Moreover, in the introductory report annexed to the statute, it was mentioned that the only alternative to these measures would be “collapse and destruction”⁵¹. This perception of an imminent emergency persisted during the nine months of the SYRIZA-ANEL Government, as the continuous use of decree-laws shows⁵².

Emergency, in turn, indicates that the situation of constitutional deconstruction should be exceptional or temporary. The PASOK Government itself had promised in 2010 that “the national effort [would have] a start, a middle and an end”⁵³. However, this has not been the case; in fact, constitutional deconstruction has become a permanent feature of Greek constitutional politics due to the practice of political actors and of the country’s creditors⁵⁴.

Let’s start again with statute 3845/2010. In its main body, the Government had exploited the ambiguity as to the nature of the instruments employed and had limited the role of Parliament in future implementation of the relevant agreements. Art. 1 para 4 delegated to the Minister of Finance the signature of future agreements for the application of the EAP. The original version of the provision

⁴⁸ Besides, the very strict conditions of this article would not be met. This article can only be invoked “in case of war or mobilization owing to external dangers or an imminent threat against national security, as well as in case of an armed coup aiming to overthrow the democratic regime”.

⁴⁹ See Minutes of the Greek Parliament, 6-5-2010, p. 6714.

⁵⁰ See the explanatory report, p. 1, www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/M-DNTAMEIO-eis1.qxp.pdf accessed 6-11-2015: «πράξη ευθύνης και ιστορική υποχρέωση απέναντι στον κίνδυνο κατάρρευσης της οικονομίας».

⁵¹ See the introductory report to the statute, p. 2: «η εναλλακτική πορεία θα ήταν η κατάρρευση και η καταστροφή».

⁵² “Acts of legislative content” and emergency procedures were used in order to transfer public sector funds in a special Bank of Greece account, to amend preexisting legislation on the referendum procedure and on other matters.

⁵³ *Ibid*, 2: «Όλη αυτή η εθνική προσπάθεια έχει αρχή, μέση και τέλος.»

⁵⁴ See S. COUTTS et al., *op. cit.*, p. 4 f.

required that relevant agreements be brought to Parliament for ratification. However, it was amended two days later, by a last minute “legal-technical” correction, voted again through the emergency procedure: the term “ratification” was replaced by the terms “discussion and briefing”, rendering agreements operative from their signature. According to the representative of the Government, the amendment was necessary in order for the First Loan Agreement, signed some days later, to come into immediate effect, and thus before the 19 May, the date that the bond loans matured⁵⁵. Less than a month later, art. 93 of the law 3862/2010 reiterated that agreements and MoU relevant to the participation of the country in the EFSF are brought before Parliament only for discussion and briefing⁵⁶. Nevertheless, such instruments, creating economic burdens for the Greek people and imposing austerity policies, are subject ratification according to art. 36 of the Constitution. Validity of international or supranational agreements without respect for constitutional procedures became thus permanent.

Constitutional deconstruction did not only concern the openness of the domestic system to inter- (or supra-) national legal instruments; it also took place in the internal distribution of constitutional competences between the legislature and the executive. Art. 2 of statute 3845/2010 conferred a broad range of powers to the executive to take the necessary measures for the application of the EAP. This broad delegation met objections even by parties that voted in favor of the MoU⁵⁷. Art. 43 of the Constitution concerns the delegation of powers to the executive. It declares:

“...2. The issuance of general regulatory decrees, by virtue of special delegation granted by statute and within the limits of such delegation, shall be permitted on the proposal of the competent Minister. Delegation for the purpose of issuing regulatory acts by other administrative organs shall be permitted in cases concerning the regulation of more specific matters or matters of local interest or of a technical and detailed nature....”

4. By virtue of statutes passed by the Plenum of the Parliament, delegation may be given for the issuance of general regulatory decrees for the regulation of matters specified by such statutes in a broad framework. These statutes shall set out the general principles and directives of the regulation to be followed and shall set time-limits within which the delegation must be used.”

The MoU, affecting virtually all domains of governmental policy, could not be considered “more specific matters or matters of local interest or of a technical and detailed nature” as paragraph 2 imposes. Nor was statute 3845/2010 valid as a framework-statute, as defined in paragraph 4; constitutional law scholars agree that the formal conditions for such a statute were not fulfilled. Therefore, the relevant statutory

⁵⁵ See Minutes of the Greek Parliament, 6-5-2010, p. 6742.

⁵⁶ See Law 3862/2010, OJ 113 A'/13-07-2010.

⁵⁷ See Minutes of the Greek Parliament, 6-5-2010, p. 6788.

provisions, far too broad to meet the commonly accepted constitutional limits to the delegation of legislative power, made emergency norm production a permanent possibility⁵⁸.

While constitutional forms were deconstructed, a web of international legality was being fashioned around the Loan Facility agreed between Greece and its creditors. As we saw, art. 93 of the law 3862/2010, voted on 5 July 2010, declared that agreements and MoU relevant to the participation of the country in the EFSF are brought before Parliament only for discussion and briefing. However, the same article explicitly provided for the legal status of loan agreements as *international conventions* which, contrary to other agreements, are brought to Parliament for *ratification* and are valid only after the publication of the relevant statute in the Official Gazette⁵⁹. Following this provision, the EFSF Framework Agreement together with its amendments was brought to Parliament for ratification, more than a year after its initial signature⁶⁰. If we take into account that such ratification did not take place in other EFSF countries, why was it needed in Greece?

The answer is that the “legalization” of international agreements in the domestic sphere was deemed to protect creditors from the consequences of an abrupt political change, already predictable at the time⁶¹. Indeed, art. 28 para 1 of the Constitution confers supra-legal status to ratified international agreements. Therefore, generally, promoters of austerity have always presented the measures in public debates as resulting from a *legal* obligation of the Greek Government. Possessing an ambiguous status (European norms, international norms or economic agreements concluded by the State as *fiscus*?), Eurocrisis legal instruments have acquired a *de facto* validity and bindingness in the domestic sphere.

Sometimes this was obtained by invoking the European commitments of the country. Austerity measures included in statute 3845/2010 did not have a temporary character. Since economic emergency was invoked for their justification, the measures were contested before the Council of State as disproportionate to their aim. However, the Court specified that the legislative purpose was “*not only to face, according to the assessments of the legislature, the sharp fiscal crisis but also [to consolidate] public finances in a way that will be sustainable in the future.*”⁶² This purpose was characterized a “*compelling public interest*” and “*an aim*

⁵⁸ It is generally accepted that a framework-statute must concern a homogeneous subject-matter and must determine the general legislative guidelines for the regulation of the matter. See A. MARKETOU - M. DEKASTROS, *op. cit.*, para X.7.

⁵⁹ Yet, according to art. 94 of the same law, this provision is retroactively valid only from 1-6-2010; it thus does not concern the First Loan Agreement. See A. MARKETOU - M. DEKASTROS, *op. cit.*, para IV.2. It is interesting to note that the same provisions had been included in the draft law ratifying the First Loan Agreement, which was never discussed or voted in Parliament.

⁶⁰ Art. 48, Law 4021/2011, OJ A’ 218/03-10-2011.

⁶¹ The representatives of PASOK actually admitted that ratification was required by creditors in some cases. See Minutes of the Greek Parliament, 5-7-2010, p. 9581 www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20100705.pdf accessed 6-11-2015.

⁶² See dec. 668/2012, par. 35.

of common interest for Eurozone MS, in view of the obligation of fiscal discipline and guarantee of the stability of the Eurozone as a whole, established by EU legislation.” Was it thus an economic *emergency* that the country is facing or was it rather a *requirement by European legislation* to follow a certain economic policy?

As far as the Second EAP is concerned, ambiguity as to its nature was preserved at a supranational level as well. The First Review of the Second EAP declared that “The EU Council decision (...) adopted upon a recommendation of the European Commission, sets the steps and deadlines to be respected to correct the situation of excessive deficit.”⁶³ In other words, it seems that the program acquired a European legal mantle. However, the Review went on to state that the MoU documents were drafted jointly by the troika and the Greek authorities and were implemented according to a pre-agreed time-table⁶⁴. In other words, though the “steps and deadlines” were European legal obligations, the specific provisions in the MoU – “comprehensively identif[ying] the specific measures to be taken, going into a high degree of detail” – were not⁶⁵.

The ambiguous nature of the MoU commitments did not reassure the country’s creditors, who sometimes required *personal written confirmations* by Greek political leaders that they would follow the policies defined in them⁶⁶. Even though such confirmations would only have a political nature, their international and constitutional legality is doubtful, especially insofar they were required as a condition for the application of the Loan Agreement by the creditors. Even more, in the First Review of the Second EAP it was stated that the MoU documents would be “subsequently transformed into a *cogent* law through a vote in Parliament.”⁶⁷ Still, when a normal voting procedure is employed, a law can be “cogent” in Greece only if it is ratifying international legal agreements. In other words, it seems that, whilst a web of international legality was being constructed, it was only operating in the domestic legal sphere, binding Parliament and future Governments. On the contrary, the troika’s missions and the MoU did not need to be founded on any international or European legal text and did not engage the accountability of European institutions involved before the ECJ.

What is more, progressively the MoU ceased to be perceived as an exceptional instrument to face the economic emergency; it was “normalized”. For the first time, the First Review of the Second Adjustment

⁶³ European Commission, *The Second Economic Adjustment Programme for Greece - First Review* (Occasional Paper on the European Economy No 123, December 2012), p. 7,

ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp123_en.pdf accessed 6-11-2015.

⁶⁴ See European Commission, *The Second Economic Adjustment Programme for Greece – Fourth Review* (Occasional Paper on the European Economy No 192, April 2014), p. 9,

ec.europa.eu/economy_finance/publications/occasional_paper/2014/pdf/ocp192_en.pdf accessed 6-11-2015.

⁶⁵ See the first review of the Second AEP, p. 7.

⁶⁶ See J. STRUPCZEWSKI, *Eurogroup set to release Greek tranche, fix EFSF leveraging rules*, in *Reuters US*, 25-11-2011, www.reuters.com/article/2011/11/25/eurogroup-idUSL5E7MO3NZ20111125 accessed 6-11-2015.

⁶⁷ See the fourth review of the Second AEP, p. 7 (emphasis added).

Program stated that the MoU texts “are living documents and are modified at every quarterly review mission, based on implementation of previous commitments and identification of new ones. The first program documents were established in May 2010. The set of documents included in this publication constitutes the seventh version since then.”⁶⁸ This declaration, repeated in following reviews, established continuity and coherence between the First and the Second EAP. Most importantly, omitting any reference to exceptional circumstances and characterizing the MoU “living documents”, the declaration overturned their *ad hoc* nature.

Ironically, the calls of the SYRIZA-ANEL Government for a political solution to the situation only led to more institutionalization and normalization of the EAPs. The third program and its technocratic rationale were not anymore dictated by the troika specialists, but were explicitly endorsed by the Euro-area Heads of State and Government⁶⁹. Subsequently their concrete terms were politically approved by the Eurogroup Ministers⁷⁰ and were even voted upon by the Parliaments of the Euro-area MS⁷¹. The Loan Agreement is now regulated by European law, under the ESM framework, which has not an *ad hoc* or exceptional nature. Besides, refusal to reconsider the amount of the Greek debt leads to the probably eternal prolongation of the loss of national sovereignty. The MoU is not anymore an *ad hoc* exceptional instrument but enjoys the legitimacy of an international treaty. The Euro-crisis agreements are perceived as binding international obligations by the Greek Government and are ratified as such (though without application of art. 28 of the Constitution)⁷². Thus, in the September 2015 elections, the political program that the new Government would apply was pre-defined. The only stake of the elections was *who* would apply it⁷³.

6. Afterword: the judiciary as the last rampart of the Constitution

More than five years of prolonged economic emergency have thus produced in Greece an unusual constitutional-political situation for a Western democracy. Constitutional politics and norm production is not anymore based on democratic deliberation, as the Constitution imposes, but on international

⁶⁸ *Ibid.*

⁶⁹ See Euro Summit Statement.

⁷⁰ See Eurogroup statement on the ESM program for Greece, 14-8-2015, www.consilium.europa.eu/en/press/press-releases/2015/08/14-eurogroup-statement/ accessed 6-11-2015.

⁷¹ B. SILLS, *Greece Countdown: How Europe Votes on the New Bailout* in *Bloomberg*, 18-8-2015, www.bloomberg.com/news/articles/2015-08-18/greece-bailout-european-lawmakers-vote-on-new-deal accessed 6-11-2015.

⁷² See statute 4336/2015, OJ 94 A’/14-8-2015. Note that this statute ratified the *draft* agreement and MoU (the creditors would not sign it before it was approved by all European parliaments). Interestingly, the Euro Summit statement, 13-7-2015 was also ratified with statute 4334/2015.

⁷³ See the announcement of the early elections of September 2015 by Alexis Tsipras www.youtube.com/watch?v=OGVoWlhVBJE accessed 6-11-2015.

agreements concluded by the executive and having ambiguous nature and changing content. Constitutional rules are constantly circumvented or abused. Constitutional deconstruction even seems to have acquired a permanent nature not depending by any state of exception or emergency. Besides, the EAP instruments and procedures are institutionalized and “normalized” both in domestic and supranational law. Still, the Constitution is broadly recognized as a valid legal text. Though emergency has sometimes corroded its forms, the institutions that it provides for are operating according to its procedures and in its name. Is there any hope for constitutional democracy in Greece? Is there any place for the Constitution as a valid point of reference in constitutional-political decision-making?

In this context of constitutional chaos, the last rampart of the Constitution is the judiciary. Due to its position and function, the judiciary is among the last institutions expressing a faith in the formal Constitution⁷⁴. Judicial activism has been quite rare in Greek constitutional politics. Besides, possibilities for such activism during the crisis are limited to the scrutiny of the substantive evaluations of public authorities: according to the Greek conception of the separation of powers, the *interna corporis* of Parliament are not subject to judicial review. Still, after a period of numbness, where emergency rhetoric justified judicial restraint and validated the policies of austerity⁷⁵, the Greek supreme courts finally decided to assume a more active role. In the beginning they mobilized clear constitutional provisions like those ensuring collective labour rights⁷⁶. Subsequently, the Supreme Administrative Court and the Court of Audit found a way to give a minimum normative content to certain social rights as well, through the principle of proportionality⁷⁷.

Thus, in recent decisions, the Council of State and the Court of Audit have dedicated much of their reasoning in the assessment of the impacts of austerity policies on the rights of the plaintiffs⁷⁸. They have thoroughly scrutinized the evaluations of public authorities, who must examine less restrictive alternatives and observe the principles of equality, solidarity and human dignity. Interestingly, the courts have disapplied legislation infringing the rights of the claimants, when they considered that “the financial interest of the State [that justified it] was no longer preemptory”⁷⁹. Having clearly identified the connection between the measures and the EU obligations of the country, the supreme courts insist that

⁷⁴ On the loss of faith in the Greek Constitution as a way to approach constitutional-political change in Greece during the crisis, see A. MARKETOU, *Economic Emergency and the Loss of Faith in the Greek Constitution*, *op. cit.*

⁷⁵ See CoS Pl., dec. 668/2012; dec. 1283, 1284 and 1285/2012, 2-4-2012.

⁷⁶ Cf. CoS Pl., dec. 2307/2014, 27-6-2014;

⁷⁷ See X. CONTIADES - A. FOTIADOU, *Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation*, in *Int. J. Con. L.*, 10, 2012, p. 660. The authors claim that the only way to preserve the normativity of social rights in times of crisis is proportionality analysis.

⁷⁸ Court of Audit, 4th Special Sitting of the Plenum 31-10-2012; 2nd Special Sitting of the Plenum 27-2-2013, dec. 4327/2014, 23-6-2014; CoS Pl., dec. 2192-2196/2014, 13-6-2014 et al.

⁷⁹ See dec. 2192-2196/2014. Similarly Court of Audit, dec. 4327/2014.

constitutional values should be preserved as well. Therefore, they impugn onerous measures imposed upon certain groups of citizens according to “a purely mathematic” and thus “profoundly inappropriate” criterion⁸⁰.

However, the substantive human rights values that the Greek courts invoke have a content that is not easily observable and agreed upon. Despite their entrenchment in the EU Charter of Fundamental Rights and in other international conventions, their existence is only translatable in numbers in the technocratic discourse of European institutions and the media. For example, the Euro Summit stated that the Greek Government must “carry out ambitious pension reforms and specify policies to fully compensate for the fiscal impact of the Constitutional Court ruling on the 2012 pension reform”⁸¹. No matter that the purely arithmetic rationale of austerity was generally criticized in the decision. No matter that the impacts of the Council of State rulings are generally not immediate, but depend on implementation. No matter that Greece does not have a constitutional court *at all*. All that matters is what the creditors perceive as the ruling’s *fiscal impact*.

Will the Council of State and the Court of Audit continue to resist to the quantitativisation of politics and the Constitution? Will they remain insensible to the critiques articulated by the media and technocrat politicians against the defenders of the formal Constitution? Will European institutions continue to neglect the constitutions and democratic procedures of (certain of) its member states? And, if Weiler is right in saying that ““legitimacy resources” of the [European] Union (...) are depleted, and that is why the Union has had to turn to its Member States for salvation”⁸², what does all this mean for European integration?

⁸⁰ CoS Pl., dec. 4741/2014, 29-12-2014.

⁸¹ See the Statement, p. 3.

⁸² J. WEILER, *Europe in Crisis - On “Political Messianism”, “Legitimacy” and the “Rule of Law”*, in *Singapore Journal of Legal Studies*, 2012, p. 248, p. 249.